No. 1055

In the Supreme Court of the United States

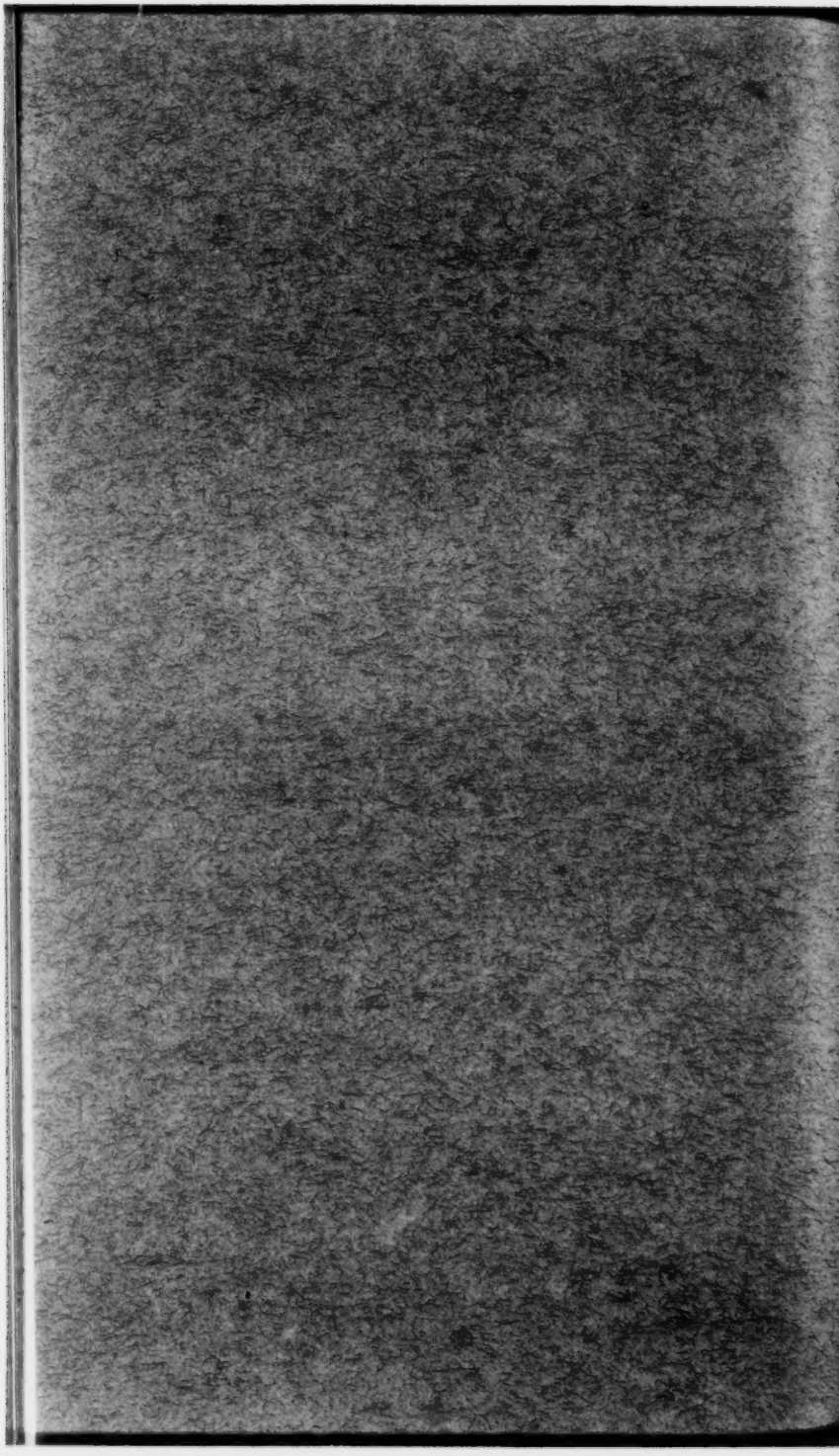
October Term, 1941

J. G. [illegible]

[illegible]

ON PETITION [illegible]
STATES [illegible]
CIRCUIT

BRIEF [illegible]



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CITATIONS

460105—42

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 1158

J. G. GLOVER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The majority and dissenting opinions in the circuit court of appeals (R. 714–723) are reported at 125 F. (2d) 291.

JURISDICTION

The judgment of the circuit court of appeals was entered on January 23, 1942 (R. 723), and rehearing was denied on March 23, 1942 (R. 758, 818). A petition for a writ of certiorari was filed April 20, 1942. The jurisdiction of the Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether a scheme by a state official to cause buildings to be erected upon his private property, by state labor and with state materials and funds, constitutes a scheme to defraud within the meaning of the mail fraud statute.

STATUTE INVOLVED

The mail fraud statute (Section 215 of the Criminal Code, 18 U. S. C. 338) provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such

letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than $1,000, or imprisoned not more than five years, or both.

STATEMENT

Petitioner was charged in a 20 count indictment returned in the Northern District of Georgia with using the mails in execution of a scheme to defraud, in violation of Section 215 of the Criminal Code. The indictment alleged: As Supervisor of State Forces of the Georgia Highway Board, petitioner occupied an office and position of public trust and was charged with the duty of supervising and managing state convicts and other forces engaged in highway construction, with establishing, constructing, and maintaining prison camps, and with erecting and installing buildings thereon.[1] It was the plan, rule, and practice of the Highway Board that necessary structures for prison camps should be constructed upon lands leased by the Board for that purpose with the understanding that when the land ceased to be used by the State, the leases would be terminated and the buildings constructed upon the leased premises would become the property of the lessors. Petitioner devised and intended to devise a scheme to defraud the Highway Department, the State, and the taxpayers, of large sums of money by

[1] For a description of petitioner's duties, see R. 244, 432–433, 579–580.

acquiring in his own name lands adjacent or near to prison camp sites and erecting thereon with state labor, funds, and materials, expensive houses and other improvements, which ostensibly were for the use of camp wardens, but actually were for his own use and benefit. In carrying out his scheme petitioner made use of the mails (R. 5–44).

Petitioner was convicted on all 20 counts of the indictment (R. 45), the verdict was subsequently set aside as to two of the counts (R. 702), and he received concurrent sentences of a year and a day on each of the remaining 18 counts (R. 45–46). The circuit court of appeals, one judge dissenting, affirmed his conviction (R. 714–723).

The Government's case may be summarized as follows:

The Dawson County house.—In Dawson County, Georgia, petitioner, through an intermediary, acquired an eight-acre plot adjacent to a prison camp at a cost of $140 from one Crane who also owned the property upon which the camp was located (R. 47, 50–51, 52). The camp was situated in a valley, and petitioner instructed the camp warden to build a "roomy, good comfortable place" (R. 62–63, 73) upon a hill about 600 or 700 feet distant (R. 52), although it could have been constructed on the property leased by the state from Crane (R. 60). A six-room house was constructed having screened sleeping porch, front porch, bathroom, electric lights, stone and cement

foundation, concrete steps to the basement, paved driveway, and a garage with a concrete floor (R. 63–66). A wire fence was constructed around petitioner's entire eight-acre plot (R. 372). At petitioner's direction a spring was boxed in with concrete (R. 54, 63), a cement basement built (R. 65), and an electric pump and an 800-gallon water tank installed (R. 54). The house had permanent electric wiring (R. 115). A ramp was built across a gulley to the highway, which it was estimated required 4,000 cubic yards of dirt costing 20 cents a yard (R. 53, 63).

The house was occupied by an unmarried warden (R. 55), and petitioner admitted that it was more elaborate and expensive than he would have constructed for himself. (R. 559, 616). Petitioner and a party of friends at one time stayed at the house for several days (R. 64, 71–72, 402–404).

The Dade County house.—In Dade County, petitioner, stating that he desired to erect a summer cottage (R. 123), instituted negotiations as a result of which he procured, at a cost of $450 (R. 122) a five-acre tract (R. 107) on a bluff overlooking a scenic highway (R. 108, 121–122). At petitioner's direction, the warden constructed at a point on the bluff indicated by petitioner (R. 120–121), and about 1.5 or 1.6 miles from the camp (R. 123, 142), a house having a composition roof, cemented rock foundation, storm sheeted

walls, screened sleeping porch, a basement with a concrete floor, and cemented rock steps (R. 122-124). Work was begun on this house about a month after the deed to the property upon which it was situated was delivered to petitioner (R. 122). There was also constructed a septic tank, rock driveway (R. 107), a pump with a concrete floor (R. 111), a Delco lighting system (R. 118, 126), and a well (R. 118–119, 136–137).

The Miller County house.—Petitioner also acquired indirectly certain property in Miller County (R. 155–156, 162). The County Board of Miller County, by resolution, authorized the sale of a lot in Colquitt to the camp warden (R. 176), but the deed thereto was made to petitioner on February 16, 1940, at his suggestion (R. 155–156). The price of the tract was $50 (R. 162), which seems never to have been paid (R. 185). The house constructed on this plot consisted of a living room, two bed rooms, a dining room, kitchen, and bath (R. 162), and a sewage disposal system (R. 182).

Concealment of facts from Highway Board.—All of these houses and improvements were admittedly constructed with convict and other labor furnished by the Highway Board, and all of the material used was paid for by the state without the Board or the state disbursing officers being aware that the structures were being placed on

petitioner's land (R. 150–151, 237–238, 276, 278, 296–297, 427). Petitioner admitted that he did not tell the members of the Highway Board of the construction done upon his property and stated that "if they did ask me, I planned to tell them when they wanted to know" (R. 629). The Board was first advised of petitioner's activities by post office inspectors and the United States Attorney (R. 141, 238, 297, 453).

Although petitioner was instructed by the Board to build all wardens' houses as cheaply as possible (R. 294, 308) and as temporary structures (R. 300), the houses built on his lands were of a permanent type and much more expensive and elaborate than those built at other camps.[2] Requisitions and pay rolls were approved by petitioner (R. 211–213, 216–220, 231, 233–236). Ma-

[2] It was estimated that the Dawson County house cost from $4,000 to $5,000, that the Dade County house cost $3,319, and that the power plant erected in connection therewith cost $1,675 (R. 202, 205, 318). In contrast, the estimates in connection with wardens' houses in other camps were: Soperton, $450 to $600 (R. 202, 207, 281, 282–283), and $1,060 (R. 317); Hamilton, $700 or $750 (R. 206); Hortense, $2,015 (R. 317); Lakeland, $1,796 (R. 327). Only the Dawson and Dade County houses had stone foundations and subfloors; only the Dawson County house had copper screens, and only the Dade County house had a built-in bathtub and wallpaper (R. 339). No salvage could be made of the septic tank, shingles, roofing, concrete and rock work (R. 339–340) and much of the flooring (R. 382) in the Dawson and Dade County houses and, of course, "all the erection labor would be lost" (R. 339).

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terials were purchased by means of emergency "confirmation purchase orders" for less than $100 which were "automatically approved" for payment without submission to the Highway Board or the State Purchasing Department (R. 288, 440, 441).

After an investigation of petitioner had been under way for some time, he endeavored to convey the three houses to the Highway Board (R. 238). However, the deed tendered on the Dawson County tract conveyed a plot only 75 feet square, without any right of ingress and egress over petitioner's property, which entirely surrounded it (R. 250, 404–405). The water tank and spring pump were not included (R. 54–55). The Dade County deed described a plot 50 x 75 feet, which did not include the driveway, septic tank, garage, pump house, and servants' quarters (R. 108). These deeds were not accepted by the Highway Board, which was advised by counsel that they were unnecessary and that the Board had authority to remove the structures on petitioner's land, since petitioner had, in dereliction of his duty as a public official, improperly and without permission caused them to be erected upon his own property with state labor, material, and funds (R. 251).

On October 14, 1940, which was after petitioner had been indicted, the Highway Board by letter returned the deeds which petitioner had previ-

ously submitted (R. 262–263). On October 15, 1940, petitioner replied, quoting from a letter purportedly written by him on December 15, 1939, advising that all wardens' houses and other improvements on lands upon which there were prison camps were subject to removal except where a written agreement provided otherwise. The stenographer, whose initials appeared on the letter, disclaimed ever having written it (R. 645–646, 648–649) and pointed out that December 15, 1939, was an office holiday (R. 645). She stated that the purported copy was first shown to her by petitioner about October 15, 1940 (R. 646). No copy of this letter was found in the place where it would ordinarily be filed (R. 647–648).[3]

Shortly after it was brought to their attention by the post office inspectors that petitioner had constructed houses and other improvements on his own property, the Highway Board caused a claim to be filed with the surety on petitioner's bond (R. 386, 430, 443–445, 450–451, 474–476, 659). Subsequently two members of the Board, Chairman Miller being absent (R. 388), directed that the claim be withdrawn as premature (R. 387–388). This was after a meeting with petitioner and his attorney (R. 635), and apparently after

[3] The letters were all introduced at the trial (R. 650), but are not contained in the printed record filed in this Court having been certified to the court below as original exhibits (R. 704–706).

the Board members had learned of petitioner's indictment (R. 388).

After petitioner had been found guilty (R. 45), according to his motion for new trial (R. 695–698, 700–701), the Board caused the Dawson and Dade County houses to be torn down and removed (R. 700). The houses were therefore used for approximately six months.

ARGUMENT

Petitioner's principal contention is that there is no proof that he "acted under a settled practice of the Highway Board substantially as alleged in the indictment under conditions which would attach the houses to the realty * * *" (Pet. 29). This contention is not only without merit, but is addressed to an immaterial issue.

In the first place, as the court below held (R. 718), the allegation that it was the "plan, rule, and practice" of the Highway Board to permit the buildings to become affixed to the realty (R. 9) was surplusage, for eliminating all reference to it, "the indictment continued to charge a fraudulent scheme and the use of the mails in furtherance thereof." See *Leche* v. *United States,* 118 F. (2d) 246, 247 (C. C. A. 5), certiorari denied, October 13, 1941, No. 169 this Term; *Hart* v. *United States,* 112 F. (2d) 128 (C. C. A. 5), certiorari denied, 311 U. S. 684, 722; cf. *Hall* v. *United States,* 168 U. S. 632, 639.

The essence of the crime charged was that petitioner caused the houses to be built on his property in violation of his fiduciary obligations and that he misled and deceived the Highway Board with the intent to defraud; hence a failure to prove the practice of the Board would not work a fatal variance, as petitioner suggests. Cf. *Berger* v. *United States,* 295 U. S. 78, 82; *Hoke* v. *United States,* 227 U. S. 308, 324. Similarly, this being petitioner's intention, whether the state had the legal right to remove the houses is immaterial. The mail fraud statute denounces devising or intending to devise any scheme or artifice to defraud and is transgressed by one who in a position of trust, public or private, seeks to derive from his fiduciary relationship a profit to which he is not entitled, at the expense of those whom he is supposed to serve.[4] *Groves* v. *United States,* 122 F. (2d) 87, 90 (C. C. A. 2), certiorari denied, October 27, 1941, No. 605, this Term; *Leche* v. *United States,* 118 F. (2d) 246 (C. C. A. 5), certiorari denied, October 13, 1941, No. 169 this Term; *Shushan* v. *United States,* 117 F. (2d) 110, 115 (C. C. A. 5), certiorari denied, 313 U. S. 574; *Buckner* v. *United States,* 108 F. (2d) 921, 926–927 (C. C. A. 2), certiorari denied, 309

[4] The scheme need not be outlined with particularity, since the gist of the offense is the use of the mails. *Cowl* v. *United States,* 35 F. (2d) 794, 798 (C. C. A. 8); *Lee* v. *United States,* 91 F. (2d) 326, 329 (C. C. A. 5), certiorari denied, 302 U. S. 745.

U. S. 669.[5] Petitioner's breach of his fiduciary obligations was complete when he caused wardens' houses of a much more expensive and permanent character than he was authorized to build to be erected with state labor, equipment, materials, and funds on his property with the intent that such houses would not be removed by the state but would be abandoned to his own use and benefit. The fact that this anticipated result was not or could not be realized is of no importance, for it is not essential that a scheme result in gain to the perpetrator to be condemned by the mail fraud statute. *Linn* v. *United States,* 234 Fed. 543, 545 (C. C. A. 7); *Calnay* v. *United States,* 1 F. (2d) 926, 927 (C. C. A. 9); *Butler* v. *United States,* 53 F. (2d) 800, 804 (C. C. A. 10). Nor is a scheme to defraud any less fraudulent because it may be frustrated by affirmative action on the part of the person intended to be defrauded or because it is not reasonable, practical, or successful. *Norman* v. *United States,* 100 F. (2d) 905, 907 (C. C. A. 6), certiorari denied, 306 U. S. 660; *Gridley* v. *United States,* 44 F. (2d) 716, 735 (C. C. A. 6), certiorari denied, 283 U. S. 827; *Byron* v. *United States,* 273 Fed. 769, 772 (C. C. A. 9), certiorari denied, 257 U. S. 653; *Grant* v. *United States,* 268 Fed. 443 (C. C.

[5] For a more exhaustive exposition of the controlling theory, see pages 14–16 of the Government's brief in opposition in the *Shushan* case, Nos. 910–913, last Term.

A. 6), certiorari denied, 256 U. S. 700; *LeMore* v. *United States,* 253 Fed. 887 (C. C. A. 5), certiorari denied, 248 U. S. 586.

In the second place, we think there was evidence from which the jury reasonably could conclude that it was, ordinarily, the practice of the Board not to remove the houses when camp sites were abandoned. Chairman Miller, of the Highway Board, testified that it was the practice not to remove buildings except where specifically agreed in written leases (R. 294, 302, 304–305, 308).[6] It was petitioner's responsibility to acquire the necessary sites and he usually negotiated or approved all leases or agreements (R. 623, 585, 587, 590, 592, 593, 612, 619, 620, 654). One lessor testified that petitioner in negotiating an agreement said that the Board would "let the property stay there when we are through" (R. 654), and another testified that his oral agreement with the Board, negotiated with petitioner, provided that "The buildings were to stay on the ground, go with the land" (R. 664). As to another lessor petitioner admitted "that the office

[6] The Chairman was to a certain extent contradicted by other members of the Board (R. 241–242, 245, 279, 418), but one of them admitted that he did "not know of any warden's house that has ever been moved that was constructed by the State" (R. 260), and in the circumstances he felt that whether the houses placed on petitioner's property could be taken away was a legal question depending possibly upon "the discretion of the Court" (R. 242).

building and guards' quarters would be left on the land when we moved away" (R. 594).

Finally, contrary to petitioner's claim (Pet. 25–28), it is by no means clear that the houses built upon petitioner's land did not become a part of the realty. The Georgia cases cited by petitioner (Pet. 28) lend no support to his argument that the houses remained personalty and that there was a right of removal in the state, notwithstanding the Statute of Frauds (Section 20–401 (4) Georgia Code). But assuming, arguendo, that Section 85–1404 of the Georgia Code would authorize a parol agreement for the removal of the houses, petitioner had no agreement of any sort, express or implied, with the Highway Board in this case. The Board, as a result of petitioner's concealment, was not even aware that the structures were being placed on his property. Petitioner's self-serving statements to the wardens, his subordinates (R. 432), made after it was common knowledge that he was under investigation (R. 126–127, 130–131), to the effect that the State was free to remove the houses,[7] were in no sense agreements with the Highway Board or the State

[7] No such statement seems ever to have been made to the Dawson County Warden and petitioner's record references (Pet. 11, 25) point to none. It is not clear when the declarations with respect to the Miller County house, the least valuable of three, were made (see R. 162).

of Georgia. It seems wholly unlikely, therefore, that such unilateral declarations would result in an exception to Section 85–201 of the Georgia Code, which provides that realty includes all lands and buildings thereon and all things permanently attached to either. Indeed, the Board was advised by an attorney in the State Legal Department that the houses were removable, not because of any agreement between petitioner and the Board, but because petitioner "as an agent of the State, could not legally divert public funds to private use, and for that reason these houses, having been built by the State, were public funds; that for him to have retained title it would have been necessary for him to have had an agreement with himself, which was impossible under the law" (R. 251).

Furthermore, the right of removal was of limited value to the state. Much of the materials which went into the houses and, more particularly, into the other improvements could not be salvaged. Among these were the septic tank, shingles, roofing, concrete and rock work (R. 339–340) and some of the flooring (R. 382). Such things as ramps, driveways, cemented springs, were not susceptible of removal. It is apparent, therefore, that the state was clearly defrauded, since the exercise of the right of removal for which petitioner contends could not make the state whole.

CONCLUSION

The case was correctly decided below, and there is neither conflict of decisions nor any question of general importance. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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